



17656(01172)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the application of:

Q. Peter Zhang
Serial No: 09/901,315
Filed: July 9, 2001
For: LARGE BOTTLE WITH
INTEGRATED HANDLE

Exr. Mai, Tri M.
Art Unit: 3727
Confirmation No.: 7760

Commissioner of Patents
and Trademarks
Washington, D.C. 20231

May 11, 2004

APPEAL BRIEF UNDER 37 CFR §1.192

Sir:

This Brief is submitted, in triplicate as required under 35 CFR §1.192(a), in support of an appeal from the final rejection of claims 11 – 16, 20 and 21 in this application, the only claims remaining in the application. The aforesaid final rejection was mailed on February 23, 2004 and set a 3-month shortened statutory period for reply thereto. A Notice of Appeal, with authorization to charge the fee therefor to a Deposit Account, was mailed under a certificate of mailing under 37 CFR §1.10(a) dated April 30, 2004.

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REAL PARTY IN INTEREST

The real party in interest is Continental PET Technologies, Inc., as assignee of the individuals named as the joint inventors in this application.

RELATED APPEALS AND INTERFERENCES

None.

STATUS OF THE CLAIMS

Claims 11 – 16, 20 and 21, the finally rejected claims in this application, are the only claims pending in the application. Clean copies of these claims, as they were amended during the prosecution of this application, are set forth on the enclosed Schedule A.

STATUS OF AMENDMENTS

No amendments to any of claims 11 – 16, 20 and 21 have been made or requested since the date of the final rejection of such claims.

SUMMARY OF INVENTION

The invention of this application is a container that is depicted in Figs. 9 – 16

of the drawing of this application. The container (40) has a body portion (42) with a closed bottom (44) and a neck portion (48) that is positioned above the body portion, the neck portion, tapering inwardly as it extends away from the body portion. The container also has a closure-receiving finish portion (46), the neck portion being positioned between the body portion and the finish portion. The container is adapted to hold a large volume of a liquid and is formed in a single piece by blow molding from a thermoplastic material that has at least an innermost layer of PET (polyethylene terephthalate) (specification , page 8, lines 20 – 28). The container has no opening extending laterally therethrough, and has a gripping feature formed by a spaced apart pair of opposed gripping panels (48d, 48e) that extend into the container and extend parallel to one another. A space (S) between gripping panels is uniform in width along an axial length portion of the gripping feature, with the space between the gripping panels being no more than 2-1/2 inch (specification, page 7, lines 4 – 31; page 8, lines 1 – 28). The body portion of the container of this invention is generally circular in cross-section (Fig. 11), the gripping panels extend into the container in the neck portion (Figs. 10 and 15), and the body portion has a diameter of at least 4-1/4 inch (original claim 11).

The function of the container of the claims at issue is to provide a hand-grippable container of sufficient capacity to package at least 64 oz. of a hot-filled

liquid. The requirement for receiving a hot-filled liquid requires the presence of indented panels (42a) to collapse after capping a hot-filled container to accommodate collapsing of the container as its contents shrink due to cooling (specification, page 7, line 30 – page 8, line 7.)

ISSUES

1. Was the final rejection of claims 11, 12 and 21 under 35 U.S.C. §103(a) as being unpatentable over Holmes (D308,167) in view of Krishanukumar '105 (U.S. 5,472,105) and further in view of Slat et al. (U.S. 5,688,572) proper as a matter of law?
2. Was the rejection of claims 11 – 16 under 35 U.S.C. §103(a) as being unpatentable over Gatten (U.S. 4,671,412) in view of Krishanukumar '105 and further in view of Slat et al. proper as a matter of law?
3. Was the rejection of claims 11 – 16 and 20 under 35 U.S.C. §103(a) as being unpatentable over Leary et al. (D250,392) in view of Krishanukumar '105 and further in view of Slat et al. proper as a matter of law?
4. Was the rejection of claim 21 under 35 U.S.C. §103(a) as being unpatentable over any one of Holmes, Gatten, and Leary, and further in view of Krishanukumar '433.(U.S. 5,279,433) proper as a matter of law?

GROUPING OF CLAIMS

Appellant requests consideration of this appeal based on the following grouping of claims:

Group I: Claim 11.

Group II: Claim 12.

Group III: Claim 13.

Group IV: Claim 14.

Group V: Claims 15 – 16.

Group VI: Claim 20.

Group VII: Claim 21.

ARGUMENTS

1. Final Rejection of Claims 11, 12 and 21.

Claims 11, 12 and 21 were finally rejected as unpatentable over Holmes in view of Krishnakumar '105 and further in view of Slat et al. in the following language:

Holmes teaches a container having a body portion with a circular cross-section, a neck portion and a pair of axially extending gripping panels at the neck portion. Holmes meets all claimed limitations except for the innermost layer being PET and the claimed dimensions of the container. Krishnakumar ['105] teaches that it is known in the art to provide a container with a diameter greater than 4 in. and S being less than 2-1/2 in. It would have been obvious to one of ordinary skill in the art to provide the container with at least 4-1/4 in. in diameter and S being at least 2-1/2 in. in Holmes as taught by Krishnakumar ['105] to provide the desired volume for the container and/or to provide the desired gripping for the container.

With respect to the innermost layer being made from PET, Slat teaches that it is known in the art to make the innermost layer 20 from PET. It would have been obvious to one of ordinary skill in the art to make the innermost layer from PET in Kerr [U.S. Des. 277,554] as taught by Slat to provide the desired properties.

Regarding claim 12, Krishnakumar ['105] teaches that it is known in the art to provide a container with an internal capacity of 64 oz. It would have been obvious to one of ordinary skill in the art to provide the container with an internal capacity of 64 oz. in Kerr as taught by Krishnakumar ['105] to provide the desired volume of contents for the consumer.

2. The Final Rejection of Claims 11, 12 and 21 is Improper as a Matter Of Law and Issue Number 1 Should be Resolved in Appellant's Favor.

To begin with, it is submitted that the tortured reconstruction of the article taught by Holmes in view of the teachings of Krishanukumar '105 and Slat et al. is a reconstruction that does not even qualify as a proper *prima facie* obviousness rejection under In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed.Cir. 1988), where the court stated that "substitution of one type ... for another in the system of ... would have been within the skill of the art," was improper because it was nothing more than a "bald assertion" that was offered without "any support for or explanation of [the] conclusion". Id. at 5 USPQ2d at 1599¹. This is especially true if it is necessary to rely on Kerr, a 4th reference, which, though not mentioned in the statement of the rejection, was referred to in the supporting discussion.

Even assuming, *arguendo*, however, the propriety of the reconstruction of the Holmes container in view of the teachings of Krishanukumar '105 and Slat et al. (and also Kerr?) as a proper *prima facie* obviousness rejection under 35 U.S.C. §103(a), it is respectfully submitted that such rejection has been overcome by the Declaration of co-inventor, Zhang, under 37 CFR §1.132, which was enclosed with the Reply To Office Action and Amendment that is dated January 13, 2004, and was accorded a January 14, 2004 PTO date received.

¹ It is to be noted that the inventions of the finally rejected claims fall more in the mechanical arts than in the chemical arts. Under In re Soni, 54 F.3d 746, 34 USPQ2d 1684, 1689 (Fed.Cir. 1995), the doctrine of *prima facie* obviousness applies most often in regard to chemical compositions, because of "the presumption being that similar compositions have similar properties."

The Zhang Declaration includes, as Exhibit A, a Resume of Mr. Zhang's qualifications that is sufficient to entitle his opinions to evidentiary value under Rules 702 *et seq.*, Federal Rules of Evidence. Specifically, the Zhang Declaration sets forth his fact-based opinion, with ample supporting qualifications, that it would not have been obvious to one of ordinary skill in the art to construct the container of Holmes from a PET-based cylindrical preform such as that taught by Slat et al. because of the unduly large dimensional changes that the Slat et al. preform would have to undergo. In that regard, according to Mr. Zhang, these changes in a preform that includes a PET-based material would lead to unacceptable appearances in the surfaces of the container in the regions undergoing the necessary changes in dimension from the dimension of the preform of Slat et al. to the container of Holmes, and this is a factual assertion that is based on his experience and not a mere opinion. Further, Krishanukumar '105 does nothing to overcome this deficiency in the combined teachings of Holmes and Slat et al. in trying to produce a container of the type taught by Holmes from a cylindrical preform of the type taught by Slat et al., especially since Krishanukumar '105 teaches a container with a gripping feature in the cylindrical body of the container rather than in its tapered neck portion.

It is also to be noted that Holmes does not teach gripping panels in the neck

of a container with a space (S) between the gripping panels being uniform in width along a substantial axial length portion of the gripping feature, because, clearly from Fig. 3 of Holmes, the space between the gripping panels in the neck portion thereof increases in width from a greater space near the juncture of the neck with the body to a lesser space substantially thereabove. The statement of the final rejection of claims 11, 12 and 21 completely ignores this feature of claim 11, in that it states [misstates] that Holmes "meets all claimed limitations except for the innermost layer being PET and the claimed dimensions of the container." Clearly, neither Krishanukumar '105, whose gripping feature is in its body portion rather than in its neck portion, nor Slat et al., which, at best, teaches, in Fig. 5, a container without a gripping feature, can be relied upon to overcome this deficiency in the teachings of Holmes.

With respect to claim 12, it is to be noted that Holmes, as a design patent, is undimensioned and has no teaching that its internal capacity could be relied upon to meet the limitation of claim 12. It is also to be noted, in reference to claim 21, that Holmes does not teach a container that has "a circumferentially spaced apart plurality of inwardly projecting panels for partial collapsing to accommodate shrinkage of [a] packaged beverage as it cools." Thus, there is no teaching in the present record, not even in Krishanukumar '105 who does teach a container that is

adapted for the packaging of a hot-filled beverage, that a gripping feature in a tapered neck container, such as that taught by Holmes et al., could be successfully adapted to the packaging of a hot-filled beverage, because Krishanukumar '105 teaches that the gripping feature should be in the body portion of the container rather than in its neck portion. In any case, In re Lee, 277 F.3d 1338, 1343 – 1461 61 USPQ2d 1430, 1434 (Fed.Cir. 2002), requires, for a proper obviousness rejection, a showing of motivation for modifying prior art references, as opposed to a subjective belief and unknown authority as expressed by an examiner; the various Holmes-based rejections of claims 11, 12 and 21 fail this test.

Accordingly, it is respectfully submitted that each of claim 11, 12 and 21 defines patentably under 35 U.S.C. §103(a) over any proper combination of Holmes in view of Krishanukumar '105 and further in view of Slat et al., (and Kerr if also relied on), and reconsideration and reversal of the final rejection of each of such claims over such references are respectfully requested. See also, In re Rouffit, 149 F.3d 1350, 47 USPQ2d 1453, 1458 (Fed.Cir. 1998) requiring a showing of "the principle, known to one of ordinary skill in the art that suggests the claimed combination," in reversing a final obviousness rejection that was based on only 3 references (King, Rosen and Ruddy) because the prior art failed to provide a "motivation," including an identification of the problem to be solved (here, provision

of a large, PET-based container for hot-filled products with a gripping feature in a tapered neck portion of the container).

3. Final Rejection Of Claims 11 - 16

Claims 11 – 16 were rejected under 35 U.S.C. §103(a) as being unpatentable over Gatten (U.S. 4,671,412) in view of Krishanukumar '105 and further in view of Slat et al. in the following language:

Holmes [sic, Gatten] teaches a container having a body portion with a circular cross-section, a neck portion and a pair of gripping panels at the neck portion. Gatten meets all claimed limitations except for the innermost layer being PET, and the claimed dimensions of the container.

Krishanukumar ['105] teaches that it is known in the art to provide a container with a diameter greater than 4 in. and S being less than 2-1/2 in.

It would have been obvious to one of ordinary skill in the art to provide the container with at least 4 –1/4 in. in diameter and S being at least 2-1/2 in. in Gatten as taught by Krishanukumar ['105] to provide the desired volume for the container and/or to provide the desired gripping for the container.

With respect to the innermost layer being made from PET, Slat teaches that it is known in the art to make the innermost layer 20 from PET. It would have been obvious to one of ordinary skill in the art to make the innermost layer from PET in Kerr as taught by Slat to provide the desired properties.

With respect to the gripping panels extending axially, portions 55, 6525 are axially extending.

Regarding claim 13, note the concaved portions 43.

Regarding claims 15 – 16, it would have been obvious to one of ordinary skill in the art to provide the dimensions as set forth in claims 15 and 16 to provide the desired proportion of the container, since such a modification would have involved a mere change in size and/or proportion. A change in size/proportion is generally recognized as being within the level of ordinary skill in the art. See In re Rose, 105 USPQ 237 (CCPA 1955), and In re Tanczyn, 44 (CCPA 704, 766, 241).

4. The Final Rejection of Claims 11 – 16 as Unpatentable Under 35 U.S.C.

§103(a) Over Gatten in View Of Krishanukumar '105 and Further
in View of Slat et al. is Improper as a Matter of Law, and Issue No. 2
Should be Resolved In Appellant's Favor.

To begin with, it is respectfully submitted that the tortured reconstruction of the article taught by Gatten in view of the teachings of Krishanukumar '105 and Slat et al. does not even qualify as a proper *prima facie* obviousness rejection under Fine. Further, even assuming, *arguendo*, the propriety of the reconstruction of the Gatten article in view of the teachings of Krishanukumar '105 and Slat et al. to be a proper *prima facie* obviousness reconstruction, it is respectfully submitted that the rejection cannot stand in the face of the Zhang Declaration under 37 CFR §1.132.

The Zhang Declaration sets forth Mr. Zhang's fact-based opinion that it would not have been obvious to one of ordinary skill in the relevant art to attempt to manufacture the Gatten container from a cylindrical preform such as that taught by Slat et al. because of the very large changes in dimension that would have been necessary in going from the Slat et al. preform to the container of Gatten; these

dimensional changes would have undesirably changed the surface appearance of the container in the region undergoing such a change in dimensions, and this is a factual assertion and not a mere opinion.

It is also to be noted, in reference to claim 12, that there is no teaching in the Gatten reference that the container depicted therein has an internal capacity of at least 64 oz., and there is no teaching that its container, which was designed for the packaging of one quart volumes of motor oil (column 1, lines 17 – 27), could be successfully adapted to the packaging of a liquid having an internal capacity of at least 64 oz., let alone a hot-filled liquid of such volume.

In specific reference to claims 15 and 16, and also to claim 14, it is also submitted that cases such as In re Rose and In re Tanczyn, which were cited for the proposition that “[a] change in size/proportion is generally recognized as being within the level of ordinary skill in the art,” are only sufficient, at best, to support a conclusion that the claimed invention is *prima facie* obvious from the prior art. However, it is clear from In re Rinehart, 531 F.2d. 1048, 189 USPQ 143 (CCPA 1976), that the concept of *prima facie* obviousness is rebuttable because it is only a legal conclusion and not a fact. Id., 189 USPQ at 147. In Rinehart, the court cautioned that “[a]nalytical fixation on an earlier decision can tend to provide that decision with an underservedly broadened umbrella effect.” Id. In any case, this

application, it is respectfully submitted, contains satisfactory rebuttal evidence to rebut the *prima facie* obviousness of the claims at issue, if proper, which is not conceded, both in the Zhang Declaration under 37 CFR §1.132, with respect to rejections based on the Gatten reference, as well as any rejection based on the Holmes reference, and is also contained with the specification of this application, with respect to the container of Figs. 9 – 16, at page 8, lines 8 – 19, which indicates that the prior art, collectively, does not teach that the result of the claim at issue is achievable.

Accordingly, it is respectfully submitted that each of claims 11 – 16 is patentable over any combination of the teachings of Gatten, Krishanukumar '105, and Slat et al. that is proper under 35 U.S.C. §103(a), and reconsideration and reversal of the final rejection of each of such claims are respectfully requested.

5. Final Rejection of Claims 11, 12, 13 – 16 and 20.

Claims 11, 12, 13 – 16 and 20 were rejected under 35 U.S.C. 35 §(a) as being unpatentable over Leary et al. (D250,392) in view of Krishanukumar '105, and further in view of Slat et al. in the following language:

Leary teaches a container with a container having a body portion with a circular cross section, a neck portion, and a pair of gripping panels at the neck portion. Leary meets all claimed limitations except for the innermost layer being PET, and the claimed dimensions of the container. Krishanukumar ['105] teaches that it is known in the art to provide a container with a diameter greater than 4in. and S being less than 2-1/2 in. It

would have been obvious to one of ordinary skill in the art to provide the container with at least 4-1/4 in. in diameter and S being at least 2-1/2 in. In Leary, as taught by Krishanukumar ['105] to provide a desired volume for the container and/or to provide the desired gripping for the container.

With respect to the gripping panels extending parallel to one another, it would have been obvious to one of ordinary skill in the art to have the two gripping [sic, gripping] extending parallel to one another to enable one to grasp the container easily.

With respect to the innermost layer being made from PET, Slat teaches that it is known in the art to make the innermost layer 20 from PET. It would have been obvious to one of ordinary skill in the art to make the innermost layer from PET in Kerr [sic, Leary?] as taught by Slat to provide the desired properties.

Regarding claims 15 – 16, it would have been obvious to one of ordinary skill in the art to provide the dimensions as set forth in claims 15 and 16 to provide the desired portion of the container, since such a modification would have involved a mere change in size and/or proportion. A change in size/proportion is generally recognized as being within the level of ordinary skill in the art. (see In re Rose, 105 USPQ 237 (CCPA 1955), and In re Tanczyn, 44 CCPA 704, 766, 241).

Regarding claim 20, note the non-circular cross-section in Fig. 6 and the two widths as set forth in the claim.

6. The Final Rejection of Claims 11, 12, 13 – 16, and 20 Under 35 U.S.C. §103(a) as Being Unpatentable Over Leary et al. in View of Krishanukumar '105 and Further in View of Slat et al. is Improper as a Matter of Law, and Issue No. 3 Should be Resolved in Appellant's Favor.

To begin with, it is submitted that the tortured reconstruction of the article taught by Leary in view of the teachings of Krishanukumar '105 and Slat et al. (and Kerr?) is a reconstruction that does not even qualify as a proper *prima facie*

obviousness rejection under In re Fine, because each of the various steps in the reconstruction is nothing more than a "bald assertion" that was offered without support or explanation for the conclusion. This is especially true if it is necessary to rely on Kerr, a 4th reference, which, while not mentioned in this statement of the rejection, was referred to in the supporting discussion.

Further, Leary does not meet "all claimed limitations for the innermost layer being PET, and the claimed dimensions of the container," as asserted by the Examiner in the statement of the final rejection of claims 11, 12, 13 –16 and 20.

Leary as a design patent and as admitted by the Examiner in the statement of the final rejection, fails to meet important claim limitations with respect to an innermost layer of the container being PET, and it also fails to disclose a container that meets the dimensional limitations of the claims at issue. As not recognized by the Examiner, however, Leary is also deficient in failing to teach that the space between the gripping panels is uniform in width along a substantial axial length portion of the gripping feature, as it clear from Fig. 4 of its drawing. Any change in this important feature of the Leary container (and its importance to Leary is underscored by the fact that it is shown in solid line), would not have been obvious to a skilled artisan because Leary et al., to the extent that it contains any relevant teachings, "teaches away" from the reconstruction that was indulged by the

Examiner in support of the rejection of claims 11, 12, 13 – 16 and 20; this reconstruction, accordingly, is impermissible under W.L. Gore & Associates Inc. v. Garlock Inc., 721 F.2d 1540, 220 USPQ 303 (Fed.Cir. 1983). As noted in Gore, when one proceeds contrary to the accepted wisdom of the prior art, which is the case in connection with the final rejection at issue, claims may be found to be valid over prior art references; otherwise, “one would fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.” Id., 220 USPQ at 312-13.

It is also respectfully submitted that the tortured reconstruction of the article of Leary et al. in view of the teachings of Krishanukumar ‘105 and Slat et al. (and Kerr?) does not qualify as a proper *prima facie* obviousness rejection under Fine; the steps involved in modifying the product of Leary et al. in view of the teachings of the Krishanukumar ‘105 and Slat et al. (and Kerr?) are in the category of “bald assertions,” and this is improper. Fine, 5 USPQ 2d at 1599.

It is also submitted that the Examiner failed to set forth the required “motivation” that is required under In re Lee, and under In re Rouffit, in support of the various steps of the tortured 3 reference (4 reference?) reconstruction of the prior art that was found necessary to support the Leary et al. based final rejections

of claims 11, 12, 13 – 16 and 20, and each of such rejections is, therefore, improper as a matter of law.

In specific reference to claims 15 and 16, it is also submitted that cases such as In re Rose, and In re Tanczyn, which were cited for the proposition “[a] change in size/proportion is generally recognized within the level of ordinary skill in the art,” are only sufficient, at best, to support a conclusion that the claimed invention is *prima facie* obvious from the prior art. It is respectfully submitted that any proper *prima facie* obviousness rejection has been rebutted, within the standards of In re Rinehart, by the text of the specification of this application, at page 8, lines 8 – 19, which indicates that the prior art, collectively, does not teach that the result of the claims at issue is achievable.

Accordingly, it is respectfully submitted that each of claims 11, 12, 13 – 16 and 20 is patentable over any combination of the teachings of Leary et al. in view of Krishanukumar ‘105 and further in view of Slat et al. (and Kerr?) that is proper under 35 U.S.C. §103(a), and reconsideration and reversal of the final rejection of each of such claims is respectfully requested.

7. Claim 21 Was Finally Rejected Under 35 U.S.C. §103(a) as Being Unpatentable Over Anyone of Holmes, Gatten, and Leary, as Set Forth Above, and Further in View of Krishanukumar ‘433 (U.S. 5,279,433) in the Following Language.

It would have been obvious to one of ordinary skill in the art to provide a plurality of inwardly projection (sic., projecting) panels in Gatten as taught by Krishanukumar ['433?] (Figs. 1 – 8) to enable one to hot fill products easily.

8. The Final Rejection of Claim 21 As Unpatentable Under 35 U.S.C. §103(a)
Over Any One of Holmes, Gatten and Leary and Further in View of
Krishanukumar '433 is Improper as a Matter of Law, and Issue No. 4
Should Be Resolved In Appellant's Favor.

To begin with, it is respectfully submitted that claim 21, as a claim that depends from claim 11, is patentable with claim 11 for the reasons set forth above in support of the patentability of claim 11 over each prior art reconstruction that was indulged in support of the final rejection of claim 11.

It is also respectfully submitted that the rejection of claim 21, relying as it does on a combination of the teachings of no less than 4 prior art references, is clearly an impermissible "hindsight" rejection under In re Fritch, 972 F.2d 1260, 23 USPQ2d 1780, where the court, quoting from Fine, 837 F.2d at 1075, 5 USPQ2d at 1600, stated, "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." Id., 23 USPQ2d at 1784. It is also noted that the statement of the rejection of claim 21 under 35 U.S.C. §103 is a Holmes-based rejection, and that this requires the inclusion of the teachings from Krishanukumar '105 and Slat et al. to support such rejection in the manner of the Holmes-based rejections of claims 11, 12, and 21. If such references were relied upon in the statement of the rejection, the rejection would more clearly have the indication of an

impermissible “hindsight” rejection, as set forth in Fritch, and Fine. It is also to be noted that Krishanukumar ‘105 “teaches away” from the invention of claim 21 in that it teaches a container with a gripping feature in a cylindrical body portion of a container rather than in a tapered neck region of the container. Thus, the reconstruction that was indulged in to support the rejection of claim 21 is impermissible under Gore.

Accordingly, it is respectfully submitted that claim 21 defines patentably under 35 U.S.C. §103(a) over any combination of the teachings of Holmes, Gatten, and Leary et al. in view of Krishanukumar ‘433 (and even if combined with the teachings of Slat et al. and Krishanukumar ‘105), that is proper under 35 U.S.C. §103(a), and reconsideration and reversal of the final rejection of such claim is respectfully requested.

9. The Examiner Improperly Refused to Consider the Zhang et al. Declaration.

The Examiner refused to attach any weight to the Zhang et al. Declaration for the reason that “[a]pplicant’s declaration has not provided any facts. It seems that the statements are mere personal opinions.” This treatment of the Zhang Declaration was improper as a matter of law.

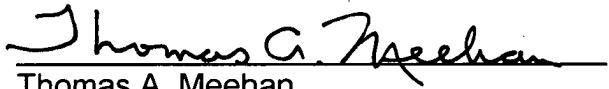
Under Rules 702 *et seq.*, Federal Rules of Evidence, and especially Rule 702, opinion testimony by an expert, which Mr. Zhang surely is, is admissible “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the

principles and methods reliably to the facts of the case." Mr. Zhang's Declaration clearly meets these standards. Further, in paragraph 5(a), Mr. Zhang's declares, with respect to Fig. 3 of Holmes, that "the container taught by such reference could not have been manufactured to acceptable specifications from a PET-based material from a cylindrical preform such as that taught by Slat et al. because the width of the cylindrical body portion of such container is too wide in comparison to the width of the tapered neck portion of such container to permit a PET-based material to be molded with such a change in dimension ..." This averment is clearly a statement that is based on personal knowledge, and is much more than "mere opinion". The same can be said with respect to his discussion of the Gatten reference in paragraph 5(b) of his Declaration. These averments of Mr. Zhang are clearly sufficient to overcome any contrary "bald assertions" of the Examiner with respect to the obviousness of modifying the Holmes and/or Gatten references, as was done in support of certain of the final rejections at issue. The Examiner's refusal to attach any weight to the Zhang Declaration is also improper under In re Piasecki, 745 F.2d 1468, 223 USPQ 785 (Fed.Cir. 1984), which requires consideration of "all of the evidence" in evaluating an attempt to overcome a *prima facie* obviousness rejection. Id., 223 USPQ at 788.

CONCLUSION

Each of claims 11 – 16, 20 and 21 is patentable in scope under 35 U.S.C. §103(a) over the prior art references relied on in support of the various final rejections in this application; accordingly, each final rejection of each of such claims should be reversed.

Respectfully submitted,


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measured between depths of said gripping panels, to the major lateral extent of said container does not exceed 0.55.

15. A container according to claim 14 wherein said ratio is at least 0.35.

16. A container according to claim 15 wherein said ratio is approximately 0.41.

20. A container according to claim 11 wherein:

said neck portion is generally non-circular in cross-section with a large width end and a smaller width opposed end, said opposed gripping panels extending into said neck portion from said opposed end.

21. A container according to claim 11 wherein:

said container is adapted for packaging a still beverage that is introduced, while hot, into the container and is sealed in the container by applying a closure to the finish portion of the container while the beverage is still hot, said body portion having a circumferentially spaced apart plurality of inwardly projecting panels for partial collapsing to accommodate shrinkage of the packaged beverage as it cools.

SCHEDULE A

Claims On Appeal

11. A container, said container having a body portion with a closed bottom, a neck portion axially positioned above said body portion, said neck portion tapering inwardly as it extends away from said body portion, and a closure-receiving finish portion, said neck portion being positioned between said body portion and said finish portion, said container being adapted to hold a large volume of a liquid, being formed in a single piece by molding from a thermoplastic material that has at least an innermost layer of PET, said container further having no opening extending laterally therethrough and having a gripping feature formed by a spaced apart pair of opposed gripping panels that extend into said container and extend parallel to one another, the space (S) between said gripping panels being uniform in width along an axial length portion of said gripping feature and the space (S) between gripping panels being no more than 2-1/2 in.;

wherein said body portion is generally circular in cross-section, and said gripping panels extend into said container in said neck portion; and

said body portion has a diameter of at least 4-1/4 in.

12. A container according to claim 11, wherein:

said container has an internal capacity of at least 64 oz.

13. A container according to claim 12 wherein:

each of said gripping panels is concave in cross-section.

14. A container according to claim 13 wherein:

a ratio of the space between opposed gripping panels, as